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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HOLLINGSWORTH OIL COMPANY, GLENN HOLLINGSWORTH, and RONNIE HOLLINGSWORTH, JR.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

F. EDWIN HALLMAN, JR.
WM. SCOTT SCHULTEN
DECKER, COOPER & HALLMAN
A Professional Corporation
1500 The Rhodes-Haverty Bldg.
134 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 522-1500

M. CLARK SPODEN
DEARBORN & EWING
1200 One Commerce Place
Nashville, Tennessee 37239
(615) 259-3560

Attorneys for Petitioners

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No. 85-5218

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant	)
	) On Appeal From
v.	) The United States
	) District Court For
HOLLINGSWORTH OIL COMPANY, INC.,	) The Middle District
GLENN HOLLINGSWORTH, and	) of Tennessee
	)
RONNIE HOLLINGSWORTH, JR., Defendants-Appellees.	)

BEFORE: JONES and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge.

Per Curiam. This is an appeal from a district court order dismissing the defendants' indictments alleging violations of 18 U.S.C. §§ 1001 and 371. The district court found that dismissal was warranted because of a lengthy delay in bringing the indictments and the prejudice resulting from that delay. On review, we reverse the order.

Defendant, Hollingsworth Oil Company ("HOC") was a participant in a set-aside program designed by the United States Department of Energy ("DOE") to provide motor gasoline to persons qualifying for hardship assistance. The Tennessee Energy Authority ("TEA") was the agency designated to administer the program in the state of Tennessee.

The government commenced an investigation against the defendants when on September 7, 1979, the defendant Glenn Hollingsworth allegedly told investigators for the General Accounting Office that he had made false applications for set-aside fuel. On February 21, 1981, the DOE

served civil subpoenas on the defendants for documents pertaining to the TEA set-aside program. After the defendants failed to comply with the subpoenas, the government, on November 3, 1981, brought an action to enforce the subpoenas. The district court judge heard argument on the enforcement action on January 21, 1982. An order was not issued until September 28, 1983, granting enforcement of the subpoenas.

The DOE gained access to the defendants books and records in December, 1983. In June 1984, the case was referred to the United States Attorney for prosecution. The case was finally submitted to the grand jury in August 1984 and an indictment subsequently returned on September 20, 1984.

The defendants were indicted for violating 18 U.S.C. § 1001 which prohibits knowingly or willfully making false statements to a government agency, and 18 U.S.C. § 371 which prohibits conspiracies to commit any offense against the United States. In the indictment, the Government charged that the defendants fraudulently applied to the TEA for more than one million gallons of set-aside gasoline for themselves and their customers, which resulted in the eventual wrongful receipt of 891,000 gallons of the gasoline by the defendants.

Sometime in 1981, the DOE sent a memorandum, dated January 28, 1981, to its agencies authorizing the destruction of all set-aside files and records. TEA did not destroy its primary files until the agency moved its offices in the spring of 1984. Following the return of the indictment, the defendants served subpoenas duces tecum upon the government demanding, *inter alia*, production of the original set-aside applications. All of the defendants' applications for the set-aside gasoline had been destroyed by the government. The government did copy portions of some of these applications before they were destroyed, but they were found to be smeared and illegible.

The defendants filed a motion to dismiss the indictment based on five grounds. Four of the grounds were dismissed by the district court. The only one addressed by the district court, and before this court, is the defendants' motion to dismiss the indictment for the "government's unreasonable preindictment delay [that] materially prejudiced" them in their right to a new trial. The district court dismissed the indictment for this reason.

The issue before this court is not a novel one. It is a well established rule of law that an indictment should be dismissed for preindictment delay only if the delay caused substantial prejudice to the defendants' rights to a fair trial and the delay was an intentional device by the government to gain a tactical advantage over the defendants. *United States v. Gouveia*, 104 S.Ct. 2292, 2300 (1984); *United States v. Marion*, 404 U.S. 307, 324 (1971); *See United States v. Lovasco*, 431 U.S. 783, 789-90, 795 n.17 (1977). The only disagreement among the circuits on the interpretation of this two element test is whether to construe the word "and" conjunctively or disjunctively. *See United States v. Mays*, 549 F.2d 670, 675 n.6 (9th Cir. 1977).

The Sixth Circuit's interpretation of *Marion* and its progeny is clear. A defendant must show that *both* parts of the test are met before he is entitled to have the indictment dismissed. *United States v. Duncan*, 763 F.2d 220, 222 (6th Cir. 1985). In fact, the law in this circuit dictates that if a defendant has not shown that the delay was intentionally caused by the government to gain a tactical advantage, an inquiry into whether the defendant has been substantially prejudiced by the delay is unnecessary. *Id.* at 223; *United States v. Greene*, 737 F.2d 572, 574-75 (6th Cir. 1984).

The district court found that the delay was not intentional on the part of the government and that sufficient explanation existed for the delay. It also found that the defendants demonstrated actual prejudice through the delay due to the destruction of the TEA documents. Under the existing law in this circuit, the defendants did not make the

necessary showing entitling them to dismissal of the complaint. The district court, however, took its analysis one step further. It found that the Government negligently permitted the destruction of the documents and such negligence warranted dismissal of the indictment. This ruling was based on an interpretation of the law by the Ninth Circuit. *See United States v. Mays*, 549 F.2d at 678. In *Mays*, the court held that a defendant's showing that the Government *negligently* caused the delay and that the defendant suffered actual prejudice from the delay required dismissal of the indictment. Even if, however, we were to accept the holding of *Mays* as law in this circuit, the district court misapplied *Mays* in this case. The purported negligence of the Government in this case was in destroying the TEA documents. Destruction of the TEA documents did not contribute to the delay, it contributed, if anything, to the degree of prejudice suffered by the defendants. Thus, the district court's reasoning even under the law in the Ninth Circuit is incorrect.

Reversal of the district court's error, however, need not be prejudicated on the basis of its misapplication of *Mays*. This circuit has already set the standard for dismissing an indictment for preindictment delay. *See Duncan*, 763 F.2d at 222-23; *Greene*, 737 F.2d at 574-75. The district court was in error when it failed to apply that standard.

We also find it necessary to address a second issue raised by this appeal. The defendants interpret the district court's decision as resting not on the *Marion* doctrine but on the "preservation of the evidence doctrine" as embodied in *California v. Trombetta*, 104 S.Ct. 2528, 2534 (1984). Simply stated, that doctrine imposes a duty on the prosecution to preserve potentially exculpating evidence. The defendants, however, mischaracterize the basis of the district court's opinion. We do not read the district court's discussion of this doctrine as being an independent basis for dismissal of the indictment. Rather, the district court discussed the doctrine in conjunction with the *Marion* test as

a means of demonstrating the potential prejudice suffered by a defendant when evidence is destroyed.

Even if we were to find the district court's discussion of this doctrine to be an independent basis for its order, we must still reverse the order. Assuming the destruction of the TEA documents does fall within the doctrine as defined by *Trombetta*, dismissal of the indictment during the pre-trial stage of the proceedings is not the required remedy. Nothing in the *Trombetta* opinion supports such a result.

Accordingly, the district court's order dismissing the indictments of the defendants is REVERSED.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

UNITED STATES OF AMERICA,	)	
VS.	)	Docket No. 3-84-00164
HOLLINGSWORTH OIL COMPANY,	)	
GLENN HOLLINGSWORTH,	)	
RONNIE HOLLINGSWORTH, JR.	)	

MEMORANDUM AND ORDER

Pending before the Court is defendants' motion to dismiss the indictments in this case. This cause came on for hearing on January 30, 1985. For the reasons discussed below, the Court GRANTS the motion to dismiss the indictments in this case.

Defendants are accused of violations of 18 U.S.C. § 1001, which prohibits making false statements, knowingly and willfully, and 18 U.S.C. § 371, which prohibits conspiracies to commit any offense against the United States. Specifically, the indictment charges in four counts that defendants made false representations and statements to the Tennessee Energy Authority ("TEA") in a program under

the jurisdiction of the United States Department of Energy. At the center of the prosecution are the applications for hardship assistance, which allegedly were prepared by defendants for defendants and defendants' customers and submitted to TEA officials.

The federal government commenced its investigation in 1979. On September 7, 1979, defendant Glenn Hollingsworth allegedly told investigators for the General Accounting Office that he had made false applications for set-aside fuel.[1] On September 20, 1984, an indictment in four courts was filed against defendants.

The defendants raise five issues in its memorandum in support of the motion to dismiss the indictments: (1) as a matter of law, the indictment fails to show a violation of 18 U.S.C. § 1001; (2) the indictment fails to satisfy the requirements of prosecution under 18 U.S.C. § 1001; (3) because there was no definition of "hardship" in the administration of the Tennessee set-aside program, defendants did not (and could not) submit false statements; (4) the Government willfully destroyed documents that were crucial to a proper defense; and, (5) the Government's delay of five years in seeking the indictment warrants dismissal.

As to the first three of these issues, their resolution depends on the facts that would be developed at trial. While the position of defendants that the law as applied in their case failed to define key terms in the crimes of which they stand accused, it would be premature for the Court to dismiss the indictment until the prosecution had an opportunity to present the facts that it believes constitute violation of 18 U.S.C. § 1001. As to the fourth issue, the defendants have failed to convince the Court that the Government willfully destroyed the documents sought by the defendants.

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1. Under the set-aside program the federal government allocated or set aside fuel for the states to distribute.

In the last issue, the Court notes that the defendants are not claiming that the statute of limitations has run on the counts of which they stand accused; instead, they argue that because the Government failed to seek an indictment in a timely manner, they no longer have access to certain crucial material, which has been destroyed by the State of Tennessee.[2] In *United States* v. *Marion*, 404 U.S. 307 (1971), the Supreme Court recognized that "the statute of limitations does not fully define the appellees' [defendants'] rights with respect to the events occurring prior to indictment." *Id.* at 324. Of crucial importance to the Court was that in order to dismiss a prosecution because of pre-accusation delay by prosecutors, the defendant must be able to demonstrate actual prejudice. *Id. Accord United States* v. *Gouveia*, ___ U.S. ___, 104 S.Ct. 2292, 2299-2300 (1984). In refusing to proscribe the specific circumstances that would warrant dismissal, the Court stated: "[t]o accommodate the sound administration of justice to the right of the defend-

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2. Almost all of the files sought by the defendants were destroyed in 1984 when the TEA-Energy Division changed locations. Until 1982, the state was required to keep those records. On June 11, 1981, T. Wendell Butler, Acting Deputy Administrator, Economic Regulatory Administration of the United States Department of Energy stated in a memorandum addressed to all directors:

> SUBJECT: DISPOSAL OF STATE SET-ASIDE PROGRAM RECORDS
>
> The President's Executive Order No. 12287 of January 28, 1981, abolished Federal controls on the pricing and allocation of motor gasoline and propane, thereby cancelling the State Set-Aside Program as of March 31, 1981.
>
> Although the need for access to your set-aside program records is unlikely, we request your cooperation in retaining these files through calendar year 1982. We ask for your cooperation in this matter in view of possible litigation action and/or review for research purposes by historians.
>
> Mr. Wayne Porter, Office of Field Operations, Economic Regulatory Administration, has been designated as the contact for matters concerning this program. He may be reached at (202) 653-3379.

ant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." *Marion*, 404 U.S. at 324-25.

Nevertheless, in spite of the case by case approach proffered in *Marion*, the Tenth Circuit has construed *Marion* so as to produce a test of two factors that the defendant must prove: (1) actual prejudice to the defendant resulting from the delay plus (2) the fact that "the delay was purposefully designed to gain an actual advantage or to harass the defendants." *United States* v. *Revada*, 574 F.2d 1047, 1048 (10th Cir. 1978). In support of its position, the Tenth Circuit observed:

> As to due process rights under the Fifth Amendment [,] *Marion* cited with approval the fact that the Government conceded dismissal would be required "if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324, 92 S.Ct. at 465.

574 F.2d at 1048.
The entire sentence from which that clause in *Marion* was taken, reads as follows:

> Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.

Marion, 404 U.S. at 324 (footnote omitted). Therefore, if actual prejudice and intentional delay for tactical advantage could be shown, the prosecution should be dismissed.

But only this particular set of circumstances (actual prejudice plus intentional delay) was discussed by the Court in *Marion* as justifying dismissal. After stating the Government's position, the Court went on the state:

> However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution. Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-cased detriment to a defendant's case should abort a criminal prosecution.

Id. at 324-25 (footnotes omitted).

The rule in the Sixth Circuit is consistent with this Court's reading of *Marion*. *See United States* v. *Alred*, 513 F.2d 330, 332 (6th Cir.), *cert. denied*, 423 U.S. 828 (1975) ("given a sufficiently unexplained pre-indictment delay and sufficient prejudice stemming from such delay, a pre-indictment delay could violate due process." (footnote omitted)). In *United States* v. *Swainson*, 548 F.2d 657 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977), the Sixth Circuit stated that if defendants proved actual prejudice and intentional delay, they would be entitled to dismissal. *Id.* at 663-64. But there is no indication in *Swainson*, just as in *Marion*, that the Sixth Circuit was holding that that was the only set of circumstances in which dismissal was proper. The Ninth Circuit has also supported a broader reading of *Marion*. In *United States* v. *Mays*, 549 F.2d 670 (9th Cir. 1977), the court rejected an inflexible approach in determining whether the prosecution should be dismissed. *Id.* at 678. Specifically the court required actual prejudice to the defendant and "some culpability on the Government's part either in the form of intentional misconduct or negligence." *Id.*

In the case at bar, applying the logic developed by the Sixth Circuit in *Alred*, and *United States* v. *Giacalone*, 477 F.2d 1273, 1276-77 (6th Cir. 1973), and by the Ninth Circuit in *Mays*, a court should consider dismissal if defendants demonstrate a pre-indictment delay of sufficient duration and actual prejudice resulting from that delay. It is the judgment of the Court that under the circumstances of this case, defendants have satisfied these two threshold considerations. First, it cannot be disputed that a delay occurred. The alleged false documents were filed in 1978; the Government commenced its investigation in 1979; and in 1981, according to the Government, one of the defendants admitted that he had knowingly filed false documents. Yet the Government did not seek an indictment until September 1984. Second, it is equally clear to the Court that defendants have suffered actual prejudice as a result of the delay. As evidenced by defendant's extensive memoranda, a substantial element of their defense would be based on a position that their prosecutions are barred for vagueness because there were no definitions of key terms in the set-aside program—by either the federal or the state government; as a result, defendants were never on notice as to what acts were unlawful. However, all of the documents of the TEA were destroyed prior to the indictments, making it extremely difficult, if not impossible, for the defendants to put on documentary proof or to locate key witnesses. Therefore, the Court concludes that defendants have demonstrated delay and actual prejudice.

Having satisfied the two threshold considerations of delay and actual prejudice, the defendants must finally show that the Government was intentionally or negligently responsible for the delay or for the creation of the actual prejudice. *Marion*, 404 U.S. at 324-25; *Alred*, 513 F.2d at 332; *Mays*, 549 F.2d at 678. The Court will initially address the question of intentional delay. The courts have thus far

recognized at least two situations that satisfy this requirement. First, if the Government intentionally delayed bringing the indictment, dismissal is appropriate. *Marion*, 404 U.S. at 324; *Revada*, 574 F.2d at 1048. A second reason for dismissal is if there is "a sufficiently unexplained pre-indictment delay." *Alred*, 513 F.2d at 323; *Giacalone*, 477 F.2d at 1276-77. The Court finds that there has been no intentional delay by the Government and that sufficient explanation exists for the delay.

Now the Court turns its attention to the question of whether the Government was negligent in allowing the documents to be destroyed. In *Giacalone*, 477 F.2d at 1276, the Sixth Circuit held that absent a showing of intentional governmental delay, actual prejudice must be demonstrated. This Court has previously determined that defendants suffered actual prejudice, and it now finds that the Government negligently permitted the pre-indictment destruction of the documents of the TEA, knowing that it had an ongoing criminal investigation involving those documents. *See Mays*, 549 F.2d at 678. It is this negligence that warrants dismissal. The Government cannot argue successfully in rebuttal that it made copies of those documents. The Government admittedly copied only portions of those documents, and many of those copies are partially or completely illegible.

A recent Supreme Court decision serves as contrast for the case at bar and demonstrates the concern of which the courts must be mindful in determining whether destruction of evidence jeopardizes the right to a fair trial. In *California* v. *Trombetta*, ___ U.S. ___, 104 S.Ct. 2528 (1984), a defendant suspected of drunk driving challenged the failure of the state to preserve his breath sample. The defendant maintained that the state's failure to preserve the sample jeopardized his ability to put on one of his defenses. *Id.* at 2534. The Supreme Court, however, held that under the

facts of that case, the state had not violated the Federal Constitution. The Court cited the following reasons for finding for the state: (1) breath samples were routinely destroyed and did not represent an attempt to avoid disclosing helpful information to the defendant; (2) the record revealed no allegation of official animus towards the defendant; (3) the breath analyzer used was very accurate and was periodically reviewed and certified by the California Department of Health; and (4) the policy of not preserving breath samples satisfied the requirements of constitutional materiality in that although the value of the evidence may have been obvious, the evidence could have been obtained from other sources. *Id.* at 2534-35.

In contrast, the documents in the instant case were not "routinely" destroyed but were destroyed when the TEA changed locations and with the expressed approval of the federal government. In addition, the Government's copies are not an accurate collection of all the documents and in fact many of those "copies" do not depict all of what was contained in the originals. Finally, the documents in question were definitely "constitutionally material," in that they had exculpatory value that was apparent to the Government, as evidenced by the fact that it had copies made, and were of such a nature that the defendants would be unable to obtain comparable evidence by any other means. *See Trombetta*, 104 S.Ct. at 2534; *United States* v. *Agurs*, 427 U.S. 97, 109-114 (1976).

Because of the Government's negligence in failing to protect the documents and the resulting prejudice to the defendants' ability to put on an adequate defense, it is the judgment of this Court that the Due Process Clause of the Fifth Amendment bars the prosecution of these defendants. Therefore, the Court hereby DISMISSES the indictments against all defendants.

Entered this the 8th day of February, 1985.

No. 85-5218

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant	)
v.	)
	) ORDER
HOLLINGSWORTH OIL COMPANY, INC. GLENN HOLLINGSWORTH, and RONNIE HOLLINGSWORTH, JR., Defendants-Appellees	)

Before: JONES and CONTIE, Circuit Judges; and PECK, Senior Circuit Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

No. 85-5218

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

v.

HOLLINGSWORTH OIL COMPANY, GLEN HOLLINGSWORTH, and RONNIE HOLLINGSWORTH, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

OPENING BRIEF FOR THE UNITED STATES

JOE B. BROWN
United States Attorney
Middle District of Tennessee

LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 85-5218

UNITED STATES OF AMERICA,
Appellant,

v.

HOLLINGSWORTH OIL COMPANY, GLENN HOLLINGSWORTH, and RONNIE HOLLINGSWORTH, JR.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

OPENING BRIEF FOR THE UNITED STATES

ISSUE PRESENTED

Whether the district court improperly dismissed appellees' indictment because of preindictment delay, when the court found that the government had presented a sufficient explanation for the delay and had not acted deliberately to gain a tactical advantage over appellees, when much of the delay was attributable to appellees' own actions, and where the district court erroneously determined that appellees suffered prejudice from the delay.

STATEMENT OF THE CASE

On September 20, 1984, appellees were indicted by a grand jury in the United States District Court for the Middle District of Tennessee on three counts of making false statements in matters within the jurisdiction of the Department of Energy (18 U.S.C. 1001), and one count of conspiring to commit those offenses (18 U.S.C. 371 and 1001). Prior to trial, appellees moved to dismiss the indictment on the ground, *inter alia*, that they had suffered a due process deprivation on account of preindictment delay. After considering briefs and oral argument, the district court (Nixon, J.) granted their motion on February 8, 1985. Pursuant to 18 U.S.C. 3731, the government appeals from that ruling.

STATEMENT OF FACTS

1. *Background for the indictment and the charges against appellees.*

a. The indictment in this case arose from the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 et seq., and the Department of Energy's resulting Mandatory Petroleum Allocation Regulations, 10 C.F.R. Part 211. The regulatory scheme was intended to ensure that petroleum products would be distributed on an equitable basis in the event of a shortage in supplies (see indictment at 2; appellees' brief in support of motion to dismiss indictments [sic] at 5-7 ("appellees' memorandum")). By executive order of January 28, 1981, the President terminated federal controls on pricing and allocations of gasoline (see district court's 2/8/85 opinion at 3 n.2 ("2/8/85 op.")).

Under the petroleum allocation regulations, a supplier of automotive gasoline was required to parcel out its products fairly amongst its distributors. Major refiners and importers of gasoline were required to notify each state of the

estimated volume of gasoline that would be sold and consumed in that state. In turn, the Department of Energy determined amounts of gasoline that would be "set aside" by such refiners or importers for use in that particular state to meet hardship or emergency requirements. Those amounts, and their distribution, constituted an individual state's "set-aside program" (see indictment at 2-3).

Similarly, under the applicable regulations, a distributor's share of automotive gasoline was determined by his purchases from his supplier during a designated 12-month period, known as a "base period." In this particular case, the relevant base period was November 1977 through October 1978, inclusive (see indictment at 2). A distributor could purchase from a supplier the same amount of gasoline that he had purchased in the corresponding month of the base period. In other words, if a distributor purchased 100,000 gallons of gasoline from his supplier in November 1977, then he could purchase 100,000 gallons in November 1979 and each succeeding November. Relief was available, however, through the state set-aside programs, which would allow overages to a distributor on a showing of hardship or emergency (*id.* at 2-3).[1]

The Department of Energy delegated the administration of state set-aside programs to each state. The State of Tennessee established the Tennessee Energy Authority ("TEA") to administer its set-aside program. Those distrib-

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1. In addition, Department of Energy regulations provided that a distributor could obtain relief from his monthly quota because of unusual growth in his business, defined as at least 10% above the volume of his purchases in his base period months. 10 C.F.R. 211.104(a), (b), and (e) and 211.13(c). Likewise, amounts of gasoline supplied to priority users — Department of Defense-related activities and bulk purchasers engaged in agriculture, energy production, or provision of emergency, sanitation, telecommunications or passenger transportation services, as well as cargo or freight hauling — were not counted against a distributor's monthly allocation. 10 C.F.R. 211.103(b).

utors who submitted an application for hardship assistance were eligible to receive gasoline allotments from the TEA's program. Under regulations issued by the TEA on July 31, 1979, an applicant was required to complete a form "Application for Exceptional Hardship Assistance for 30 Day Maximum" (*id.* at 3). Insofar as applicable here, that application sought information as to whether the applicant had previously submitted such an application, a showing that the applicant had unsuccessfully contacted two suppliers for the petroleum product he sought, his own total product requirements for the month, how much product he had on hand and the number of days his present supply would last, and how the fuel would be used (*ibid.*). In addition, the distributor was required to submit a separate application for each purchaser for whom the distributor requested 1,000 or more gallons of fuel. A shorter statement was necessary for consumers of less than 1,000 gallons of fuel (*ibid.*).

On receipt of the application, a TEA caseworker screened the application for completeness and accuracy. Before releasing set-aside fuel, TEA's regulations required a caseworker to consider the total amount of gasoline in the set-aside program for the month, the number of applications for set-aside gasoline, and the applicant's specific requests, including amount, historical demand and daily consumption, storage capacity, and his allocation status under federal regulations (Section 1530-1-0-.08(4), Emergency Rules of TEA State Set-Aside Program).

b. The investigation concerning appellees began as a result of appellee Glenn Hollingsworth's admission, during a September 1979 audit of the administration of the set-aside program by the General Accounting Office, that he had falsified applications for hardship assistance to the

TEA.[2] On February 21, 1981, the Department of Energy served civil subpoenas on appellees for their documents concerning the TEA set-aside program. Appellees refused to comply with those subpoenas, however, and on November 3, 1981, an action was brought in the court below to enforce the subpoenas. The same district judge who later dismissed appellees' indictment heard the enforcement action on January 21, 1982, but he did not issue an order granting enforcement until September 1983 (see district court's memorandum opinion in *United States* v. *Hollingsworth*, No. 81-3746 (Sept. 28, 1983), at 1 ("9/23/83 op.")). The Department of Energy finally gained access to appellees' books and records in December 1983, and in June 1984 the case was referred to the United States Attorney for prosecution. A grand jury investigation commenced in August 1984 and culminated with the return of an indictment the following month (see government's response to motion to dismiss at 10-11 ("government's response")).

The indictment charged appellees with making false applications to the TEA for more than one million gallons of set-aside gasoline, resulting in appellees' eventual wrongful receipt of 891,000 gallons of such gasoline. The indictment asserted that appellees' applications for hardship assistance to the TEA were fraudulent in that their customers did not qualify for such assistance, and that appellees diverted the gasoline for other uses. Included within the overt

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2. The Government Accounting Office ("GAO") is the investigating arm of Congress and is independent of the Executive Branch. See 31 U.S.C. 702(a); *McDonnell Douglas Corp.* v. *United States*, 754 F.2d 365, 368 (Fed. Cir. 1985). As a result, the GAO could not formally recommend prosecution of appellees but rather only could request the Department of Justice to investigate appellee Hollingsworth Oil Company for possible prosecution. The Department of Justice in turn routinely referred the GAO request to the Department of Energy for investigation, since the set-aside program was within the latter department's jurisdiction.

acts of the conspiracy count were 13 monthly applications for set-aside gasoline made by the individual appellees on behalf of their gasoline distribution company between October 1978 and November 1979, inclusive (see indictment, Count 1, at pages 4-7). The allegedly false applications for the months of September through November 1979 constituted the three substantive counts (*id.* at pages 7-9 (Count 1, Overt Acts Numbers 12-14 and Counts 2 through 4)).

2. *Appellees' motion to dismiss the indictment and the district court's ruling.*

Prior to trial, appellees moved to dismiss the indictment on various grounds. They first claimed that the allegations of the indictment were insufficient to state an offense under Section 1001. They also argued that, as a matter of law, the government could not prove certain elements of the Section 1001 offenses because the TEA regulations on which the charges rested failed to adequately define "hardship" and because the TEA had vested so much discretion in its employees in making hardship determinations that it was impossible for appellees to have committed an offense (see appellees' memorandum at 22-41).

In addition, they asserted that the government had unreasonably delayed bringing this case to a grand jury, and they claimed that that delay prejudiced them because the TEA had destroyed certain of its records in early 1984.[3]

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3. In their brief in support of their motion to dismiss their indictment, appellees said that they had served a subpoena on the State of Tennessee on November 6, 1984, and that they received many documents in response to their subpoena. Though, according to appellees' representation, "all primary Tennessee State Set-Aside files[,] including all Hollingsworth Oil Company documents[,] had been destroyed," appellees admitted that "several state set-aside management documents" still existed (appellant's memorandum at 15). Included within such documents that appellees received were: the Tennessee state set-aside program case re-

They argued that their defense rested on TEA's practices in applying the hardship and emergency regulations and that that defense could be shown only through the destroyed records. Appellees also claimed that the government wilfully destroyed those documents and that the preindictment delay was engineered in order to gain a tactical advantage over appellees (*id.* at 41-54).

The district court conducted a hearing on appellees' claims on January 30, 1985. At that time, the court heard legal argument only. Though the government had a witness in the courtroom—a former investigator for the Department of Energy—to testify about his photocopying of TEA records concerning appellees, the court sustained appellees' objection to that testimony (1/30/85 Tr. 38-39).[4]

Following that hearing, the court below issued a memorandum opinion in which it rejected appellees' claims concerning the adequacy of the indictment; the court reasoned that those issues had to await development of the evidence at trial (2/8/85 op. 2). The court also found that the government did not willfully destroy the TEA documents that appellees sought (*ibid.*).

With respect to the preindictment delay claim, however, the district court ruled in appellees' favor. Relying on the Ninth Circuit's decision in *United States* v. *Mays*, 549

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view officer's manual (*id.* at 17, 30); a TEA August 1979 summary of the Mandatory Petroleum Allocation Program (*id.* at 18); an official TEA publication listing criteria for case officer's review of hardship or emergency assistance applications (*id.* at 19, 34-36), as well as a January 1980 TEA memorandum clarifying rules on such case processing (*id.* at 20).

4. The government then made an offer of proof about the testimony. According to the proffer, the investigator was given the entire TEA file concerning Hollingsworth Oil Company and photocopied those portions that were not already in the government's possession. He also verified the authenticity of copies of documents that the Department of Energy already had (1/30/85 Tr. 39).

F.2d 670 (1977), the district judge reasoned that a showing of prejudice to the defendant, coupled with either intentional or negligent behavior by the government, was sufficient to require dismissal (2/8/85 op. 6). In this regard, the court below first found that appellees had suffered actual prejudice through the destruction of TEA records. Since appellees claimed that their defense would rest on a showing that the TEA did not define key terms in its regulations for the persons administering the set-aside program, the destruction of the TEA records deprived appellees of that defense, as well as the ability to locate witnesses (*id.* at 6-7). And while the court found that there was no intentional delay by the government and that there was a sufficient reason for the preindictment delay (*id.* at 7), the court below nonetheless concluded that the government was negligent in failing to protect the TEA records from destruction (*id.* at 7-8). The court deemed the copies made by the government of TEA records to be insufficient to rebut its negligence, particularly since not all the TEA documents were copied. The court also determined from the fact that the government copied the records that the documents must have had obvious exculpatory value (*id.* at 8-9). In the court's view, the government's negligence, coupled with the prejudice to appellees, was sufficient to warrant dismissal of the indictment (*ibid.*).

ARGUMENT

THE DISTRICT COURT'S DECISION RESTS ON FAULTY FACTUAL AND LEGAL FOUNDATIONS AND THEREFORE MUST BE REVERSED

As we show below, this case involves the district court's refusal to follow settled law governing claims of preindictment delay. The district court properly found that the government had not acted intentionally or to seek an unfair

advantage in not securing an indictment against appellees until October 1984. The court also correctly found that the government had furnished a sufficient explanation for the delay. Nonetheless, the court below dismissed the indictment on the ground that appellees had suffered substantial prejudice from preindictment delay and that the government had acted negligently in allowing TEA documents to be destroyed. In so ruling, the district court ignored this Court's settled precedent concerning claims of preindictment delay. In addition, the court incorrectly attributed the delay, albeit because of negligence, to the government. Finally, the court below incorrectly made a determination of prejudice in advance of trial rather than awaiting the proof at trial and considering other materials that would be available to appellees. Consequently, it is clear that the decision below cannot stand.[5]

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5. Prior to the setting of a briefing schedule in this case, appellees moved to dismiss this appeal. They first claimed that the government was improperly pursuing simultaneous appeals in this Court as well as the Temporary Emergency Court of Appeals ("TECA"). In our response, we pointed out that while protective notices of appeal had been filed to both courts, the Solicitor General had directed that the appeal in this case be pursued in this Court. Accordingly, we moved to stay proceedings in TECA. We did not dismiss the appeal in TECA because, though the instant case involves Title 18 offenses and the issues on appeal are ones purely of criminal law, the prosecution itself relates to the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. 751. TECA has jurisdiction over cases involving interpretations of the regulations under that statute (see 15 U.S.C. 754(a)(1), incorporating 12 U.S.C. 1904 note), but that court has held that it does not have jurisdiction over appeals of Title 18 criminal prosecutions that are bottomed on violations of the EPAA. *United States* v. *Zang*, 645 F.2d 999, 1002 (Emer. Ct. App.), cert. denied, 454 U.S. 864 (1981); *United States* v. *Cooper*, 482 F.2d 1393, 1397 (Emer. Ct. App. 1973). The Fifth Circuit also has held that it has jurisdiction over Title 18 offenses arising from violations of the EPAA. *United States* v. *Uni Oil, Inc.*, 646 F.2d 946, 949 (5th Cir. 1981); see also *Bray* v. *United States*, 423 U.S. 73, 75 (1975). In response to appellees' simultaneous motion to dismiss our appeal in TECA, that court dismissed our appeal, relying on the above cases, and thereby agreeing that this Court has jurisdiction over

A. *Since The District Court Found That The Government Did Not Intentionally Delay Appellees'*

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this appeal. *United States* v. *Hollingsworth Oil Co.*, No. 6-34 (Emer. Ct. App. April 25, 1985). In the event that this Court might be of the view that the issues in this appeal depend on an interpretation of regulations under the EPAA, the Court could refer that issue to TECA as a separate appeal.

Appellees also argued that the Double Jeopardy Clause barred this appeal. They claimed that the district court's dismissal of the indictment amounted to an acquittal because the destroyed documents, in their view, were the basis for the indictment. That contention obviously is frivolous. In the first place, the destroyed documents could not have been the basis for appellees' indictment, because the government never had possession of them. But what evidence the grand jury may or may not have seen is immaterial to appellees' double jeopardy claim. The crucial point is that the government never had a chance to present any evidence concerning appellees' guilt at trial, so the district court's ruling cannot possibly be construed as an acquittal. That is made all the more clear by the Supreme Court's decisions in *Serfass* v. *United States*, 420 U.S. 377 (1975), and *United States* v. *Scott*, 437 U.S. 82 (1978). In *Serfass* the Court rejected a defendant's double jeopardy claim that was virtually identical to appellees' here. In that case, the district court had granted the defendant's motion to dismiss that rested on his factual defense at trial. 420 U.S. at 389-390. Like appellees here, Serfass argued that the district court's ruling constituted the " 'functional equivalent of an acquittal on the merits.' " *Id.* at 390. The Supreme Court reversed, holding that a pretrial ruling simply does not subject a defendant to jeopardy. The Court emphasized that unless a defendant risks determination of his guilt, jeopardy does not attach. *Id.* at 391-392. And in *Scott* the Court not only reaffirmed that the government may appeal a pretrial dismissal of an indictment, but the Court also explicitly extended that rule to dismissals on account of preindictment delay. 437 U.S. at 95. Moreover, the Court also held that the government could even appeal such a ruling that occurred *during* trial because that kind of termination of a prosecution would not constitute an acquittal on the merits. *Id.* at 98-100 & n.11.

This Court has followed the reasoning of *Scott* and *Serfass*. In *United States* v. *Valle*, 697 F.2d 152, 154 (6th Cir.), cert. denied, 461 U.S. 918 (1983), the Court held that jeopardy does not attach to a district court's consideration of evidence in connection with a motion to dismiss an indictment and thus does not prevent the government from appealing the dismissal of the indictment. Accord, *United States* v. *McInnis*, 601 F.2d 1319, 1322-1323 (5th Cir. 1979). Similarly here, the district court's ruling, even though

Indictment And That The Government Had Furnished An Adequate Explanation For The Preindictment Delay, The Court Wrongly Dismissed The Indictment.

1. The Supreme Court has addressed the question of preindictment delay on several occasions. In *United States* v. *Marion*, 404 U.S. 307 (1971), the Court recognized that in certain circumstances, where a defendant demonstrates actual prejudice stemming from preindictment delay and that the government caused the delay in order to gain a tactical advantage over him, the Due Process Clause could warrant dismissal of an indictment. *Id.* at 424. In *United States* v. *Lovasco*, 431 U.S. 783 (1977), the Court expanded on that view and made clear that a showing of prejudice alone was not sufficient but rather was only a necessary threshold to a due process claim arising from a preindictment delay. In addition, a defendant had to show an improper basis for the delay. *Id.* at 789-790. The Court went on to point out that mere investigatory delay was not equivalent to the delay prohibited by *Marion*—one undertaken to gain a tactical advantage over an accused. *Id.* at 795-796. And just last Term the Court reemphasized that "the Fifth Amendment requires the dismissal of an indictment *** if the defendant can prove that the government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense." *United States* v. *Gouveia*, 104 S.Ct. 2292, 2300 (1984) (citing *Lovasco* and *Marion*). The reasons for

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based in part on its consideration of certain documents that the government may intend to introduce at trial, did not place appellees in jeopardy. Not only did the district court not resolve any issue of appellees' guilt or innocence, but the ruling occurred prior to trial, so appellees faced no risk of a finding of guilt. Accordingly, under *Scott* and *Serfass*, the government clearly may appeal the decision below.

such a strenuous burden on a defendant are obvious. Dismissal of an indictment is a drastic remedy, and there are a myriad of reasons, almost all of them legitimate, for a prosecutor's delay in securing an indictment from a grand jury. See *Lovasco*, 431 U.S. at 790-796.

Following those decisions, this Court consistently has held that in order for a defendant to succeed on a claim of due process deprivation due to a preindictment delay, a defendant must show both that he suffered substantial prejudice as a result of the delay and that the government acted intentionally in order to seek an improper tactical advantage over the defendant. E.g., *Payne* v. *Rees*, 738 F.2d 118, 122 (6th Cir. 1984); *United States* v. *Greene*, 737 F.2d 572, 574-575 (6th Cir. 1984); *United States* v. *Brown*, 667 F.2d 566, 568 (6th Cir. 1982); *United States* v. *Roberts*, 548 F.2d 665, 668 (6th Cir.), cert. denied, 431 U.S. 920 (1977); *United States* v. *Swainson*, 548 F.2d 657, 663 (6th Cir.), cert. denied, 431 U.S. 937 (1977). It is not enough to show one prong of the standard; a defendant must satisfy both parts of the test in order to succeed. *United States* v. *Greene*, 737 F.2d at 574.[6]

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6. The overwhelming majority of the circuits that have considered this issue agree with this Court that a defendant must demonstrate both actual prejudice as well as intentional governmental delay for a bad purpose before a defendant can gain dismissal of his indictment due to preindictment delay. E.g., *United States* v. *Marler*, 756 F.2d 206, 213, 215 (1st Cir. 1985); *United States* v. *Indelicato*, 611 F.2d 376, 382 (1st Cir. 1979); *United States* v. *Otto*, 742 F.2d 104, 107-108 (3d Cir. 1984); *United States* v. *Stinson*, 594 F.2d 982, 984 (4th Cir. 1979); *United States* v. *Carlson*, 697 F.2d 231, 236 (8th Cir. 1983); *United States* v. *Boles*, 684 F.2d 534, 536 (8th Cir. 1982); *United States* v. *Gutierrez*, 696 F.2d 753, 755 (10th Cir. 1982), cert. denied, 461 U.S. 909 (1983); *United States* v. *Puett*, 735 F.2d 1331, 1334-1335 (11th Cir. 1984); *United States* v. *Lindstrom*, 698 F.2d 1154, 1157-1158 (11th Cir. 1983). The Fifth and Seventh Circuits have conflicting lines of cases, one of which requires a defendant to prove prejudice plus intentional delay by the government (*United States* v. *Wehling*, 676 F.2d 1053, 1059-1060 (5th Cir. 1982);

Contrary to that settled line of cases, however, the court below did not require appellees to show that the government intentionally delayed indicting them in order to gain a tactical advantage over appellees. Rather, the district court incorrectly reasoned (2/8/85 op. 3-6) that neither this Court's nor the Supreme Court's decisions concerning preindictment delay claims required a defendant to make a dual showing of intentional delay and prejudice. Instead, the district court chose to rely (*id.* at 6) on the Ninth Circuit's decision in *United States* v. *Mays*, 549 F.2d 670, which balanced the quantum of prejudice suffered by the defendant against the government's degree of culpability. But *Mays* obviously is at odds with this Court's rulings on the prerequisites to a successful claim of preindictment delay. Hence, the decision below must fall on that ground alone.

Beyond that, since the district court found that the preindictment delay here was not intentional and that, in fact, the government had a satisfactory reason for the delay (2/8/85 op. 7), appellees' due process claim must be re-

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United States v. *Watkins*, 709 F.2d 475, 479 (7th Cir. 1983)), while the other line requires a showing of prejudice and some lesser degree of impropriety by the government (*United States* v. *Townley*, 665 F.2d 579, 582 (5th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States* v. *Solomon*, 688 F.2d 1171, 1179 (7th Cir. 1982)). The Second Circuit has pretermitted the question whether prosecutorial negligence would suffice if a defendant established actual prejudice from preindictment delay. See *United States* v. *Birney*, 686 F.2d 102, 105 n.1 (2d Cir. 1982). Hence, as of now, that court requires proof of prejudice coupled with a showing of unjustifiable governmental conduct, such as deliberate delay to gain a tactical advantage over an accused. *United States* v. *Lawson*, 683 F.2d 688, 694 (2d Cir. 1982); *United States* v. *Ruggiero*, 726 F.2d 913, 925 (2d Cir.), cert. denied, 105 S.Ct. 118 (1984). Only the Ninth Circuit would allow a preindictment delay claim on proof of prejudice coupled with governmental negligence, but even then the degree of prejudice would have to be quite severe. *United States* v. *Moran*, 759 F.2d 777, 781-782 (9th Cir. 1985).

jected. Because appellees failed to satisfy the government bad-faith prong of the equation, there is no need whatsoever to examine whether appellees suffered any prejudice. *United States* v. *Greene*, 737 F.2d at 574-575. Accord, *United States* v. *Puett*, 735 F.2d at 1334-1335; *United States* v. *Carlson*, 697 F.2d at 236. See also *Payne* v. *Rees*, 738 F.2d at 122 (a defendant must show that the government had no valid reason for the delay or that the delay was designed to gain a tactical advantage).

2. Moreover, while we do not agree with the Ninth Circuit's decision in *Mays*, 549 F.2d 670, appellees' claim still must fail even under the balancing test employed in *Mays*. That is because the court below improperly attributed the delay prior to indictment solely to the government.

In June 1981, the Department of Energy sent a memorandum to all directors of state set-aside programs. That memorandum requested that the States retain their records concerning those programs at least through 1982 (see 2/8/85 op. 3 n.2). The TEA complied with that request and in fact maintained its records until the spring of 1984, when many of the records were destroyed as part of a relocation of the office (*ibid.*; see also appellees' memorandum at 16).

In February 1981, the Department of Energy served a civil subpoena duces tecum on appellees for their records concerning applications for and purchases of set-aside gasoline. Appellees refused to comply with the subpoena, so the Department of Energy was forced to move for enforcement of the subpoena (see 9/28/83 op. at 1). That enforcement petition was filed on November 3, 1981. A hearing was held on January 21, 1982, but the district court did not enter an order enforcing the subpoena until September 28, 1983 (*ibid.*; see also government's response at 10). It was not until December 1983 that appellees provided their books and records to the Department of Energy. The Department

then moved expeditiously to review those records. In May 1984, internal departmental recommendations were made for prosecution, and in June the Department of Energy referred the case to the United States Attorney's Office for prosecution (government's response at 10-11).

All this makes abundantly clear that not only—as the court below found (2/8/85 op. 7)—was there a reasonable basis for the preindictment delay, but also that most of the delay was attributable to appellees and the district court rather than to the government. Had appellees not resisted production of their records but rather had timely produced them in March 1981 as requested in the Department of Energy subpoena, or had the district court acted promptly to enforce the subpoena, the Department could have completed its review of their records in ample time to preserve the TEA documents that were destroyed some three years later. The period of delay engendered by appellees' refusal to comply with the Department of Energy subpoena was more than two and one-half years. The indictment against appellees was returned in September 1984. However, when allowance is made for the two and one-half years spent enforcing the subpoena, the indictment could have been returned as early as March 1982—over two years prior to the time when the TEA records in question were destroyed. Thus, but for appellees' resistance to the civil Department of Energy subpoena, it is obvious that the indictment could have been returned in ample time to preserve the TEA records.[7] By refusing to comply with the subpoena, appel-

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7. Until appellees' records were available, the Department of Energy did not have a sufficient basis on which to make a recommendation for either civil or criminal proceedings against appellees. Contrary to appellees' argument below, Glenn Hollingsworth's admission in 1979 to a Government Accounting Office auditor that he had falsified records was not enough to mount a prosecution. An uncorroborated confession or admission of certain elements of an offense is not a sufficient basis for conviction

lees thereby prolonged the administrative review process and lengthened the period before the Department of Energy could make a prosecution referral to the Department of Justice and the United States Attorney. Accordingly, it is plain to see why the district court found (2/8/85 op. 7) that the government had provided a sufficient explanation for the delay. At the least, then, appellees are equally responsible for the preindictment delay and the destruction of the TEA documents.[8]

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of a crime in the federal courts. *Smith* v. *United States*, 348 U.S. 147, 152-155 (1954); *Opper* v. *United States*, 348 U.S. 84, 90-91 (1954); see also *Wong Sun* v. *United States*, 371 U.S. 471, 488-489 (1963). As a result, in order to determine whether to recommend appellees' prosecution, the Department of Energy had to secure appellees' records and compare them to information from other sources, including customers on whose behalf appellees had submitted hardship applications to the TEA. Moreover, a review of those records could have been beneficial to appellees; if Department auditors determined that information in appellees' records was exculpatory or otherwise negated appellees' criminal intent, appellees might well have escaped prosecution.

In addition to those reasons, it is of course well settled that the government does not have to bring an indictment at any specific time. As the Supreme Court recognized in *United States* v. *Lovasco*, 431 U.S. 783, "prosecutors do not deviate from 'fundamental conceptions of justice' when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause.[] It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." *Id.* at 790-791 (footnote omitted). Nor are prosecutors constitutionally obligated to file charges as soon as they marshal enough evidence to prove a defendant's guilt but before they have completed their investigations. *Id.* at 792-795 (footnote omitted). Accord, *United States* v. *Gouveia*, 104 S.Ct. at 2300 n.7. Hence, it is clear that it was not improper to delay the prosecution referral here until appellees complied with the Department of Energy subpoena and that Department could be sure of the merits of the case against appellees.

8. The decision in *California* v. *Trombetta*, 104 S.Ct. 2528 (1984), on which the district court in part relied (2/8/85 op. 8-9), does not support the court's conclusions. In that case, the Supreme Court held that the state's failure to retain breathalyzer

Under those circumstances, appellees cannot succeed even under the *Mays* standard. The Ninth Circuit plainly would not penalize the government for preindictment delay when a defendant bears concomitant responsibility for a large part of the delay. See 549 F.2d at 678 (where a defendant has established actual prejudice, "it then becomes incumbent upon the government to provide the court with its reasons for the delay"). Likewise, the *Mays* court clearly would have rejected the defendant's claim had there been an adequate explanation--as here—for the delay. While the court there said that the government's burden of explana-

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samples did not deprive the defendant of due process. In so ruling, the Court observed that the government's duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense.[] To meet this standard of constitutional materiality, *** evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and also be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 2534. Contrary to the district court's conclusion (2/8/85 op. 8-9), the TEA records here did not satisfy that test. The records the investigator copied were appellees' applications for set-aside gasoline and their supporting applications from customers. As such, the records certainly had no apparent exculpatory value; rather, the Department of Energy investigator copied those records because they appeared to be *inculpatory* in nature. This obvious inference certainly is more logical than the district court's conclusion (*id.* at 9) that the fact that copies were made showed that the records must have had exculpatory value. Our submission is reinforced by the fact that, as we discuss more fully in the text below (see pages 22-23, *infra*), individual agency employees' actions are entitled to little weight in determining how an agency's regulations were interpreted. Accordingly, it is difficult to understand how the materiality of the documents to appellees' defense should have been obvious to the government prior to the records' destruction. Moreover, to the extent that the district court concluded (2/8/85 op. 9) that the TEA documents were not "routinely" destroyed, the court obviously was incorrect. The TEA had ceased to function as an agency implementing the set-aside program, because that program was terminated in 1981. Hence, we fail to understand how a state agency's destruction of documents for a no-longer functioning office can be considered anything but "routine."

tion for the delay would rise in relation to substantial showings of prejudice to a defendant, the court still was concerned only with the reasons for the delay. If the delay was explained satisfactorily, then a defendant could not prevail. 549 F.2d at 678. Inasmuch as the court below found that there was a sufficient explanation for the delay here, appellees were not entitled to relief even under the *Mays* rule.

Indeed, the Ninth Circuit's recent interpretations of the *Mays* standard emphatically demonstrate that the district court's finding that the government had adequately explained the delay here should have ended appellees' claim. See *United States* v. *Moran*, 759 F.2d at 783, where the district court had concluded that while the government had not delayed intentionally in order to gain an advantage over the defendant, the government still had benefitted from the delay. The court of appeals reversed, however, because "our cases clearly require some showing of governmental culpability to prove a deprivation of due process." *Ibid.* In the instant case, the court below reached essentially the same conclusion as did the district court in *Moran*. By finding that the government had presented an adequate explanation for the delay, the court relieved the government of any responsibility for the delay. Nonetheless, the court went on to conclude that the government was negligent in failing to preserve the TEA documents from destruction (2/8/85 op. 8, 9). That conclusion is equivalent to the *Moran* district court's finding that the government had gained a benefit from the delay. Moreover, as we pointed out above, given appellees' equal responsibility for the delay here, the documents' destruction should not be attributed to the government alone. See also *United States* v. *Swacker*, 628 F.2d 1250, 1254 n.5 (9th Cir. 1980), where the court approved a district court's finding of no culpability on the part of the government for delaying indictment until the prosecutors were more certain of the quality and quantity of the evi-

dence against the defendant. The district court credited that same explanation for the delay here. Accordingly, even under the Ninth Circuit's balancing test, appellees' claim would not succeed.

B. *The District Court Also Erred In Determining That Appellees Suffered Actual Prejudice From The Preindictment Delay.*

In addition to concluding that the government was negligent in not preserving the TEA records, the district court also determined that appellees suffered actual prejudice from the preindictment delay. The court found that appellees were prejudiced by destruction of the TEA records because, in the court's view, appellees were deprived of their defense of showing how the term "hardship" was administered by the TEA (2/8/85 op. 6-7). In part, the court below bottomed its conclusion that the documents must have been exculpatory on the fact that a Department of Energy investigator copied the records (*id.* at 9). We submit that the district court erred in assessing appellees' claim of prejudice prior to trial rather than in light of the full trial record. In addition, the court clearly was wrong in deeming the TEA documents to be exculpatory.

The Supreme Court recently has reemphasized that claims of prejudice cannot be analyzed without reference to the entire record at trial, because, in light of the evidence and instructions, an error might be harmless. *United States* v. *Young*, 104 S.Ct. 1038, 1047 (1985); *Luce* v. *United States*, 104 S.Ct. 460, 464 (1984); *United States* v. *Hasting*, 461 U.S. 499 (1983). In *Hasting*, the Court pointed out that "[s]ince *Chapman* [v. *California*, 386 U.S. 18 (1967)], the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitu-

tional violations." 461 U.S. at 509. That rule is particularly appropriate here, where it is impossible to assess accurately the prejudice, if any, to appellees caused by preindictment delay without awaiting developments at trial.

In the first place, as we pointed out above (see page 18 n.8, *supra*), the court below clearly was wrong in concluding that the exculpatory nature of the TEA documents was demonstrated by the fact that a Department of Energy investigator copied some of them. The copied records were appellees' applications for set-aside gasoline and their supporting applications from appellees' alleged customers. Rather than being exculpatory, the documents were copied because of their falsity; they led investigators to customers who in turn stated that they had not applied for set-aside gasoline and knew nothing about any overage requests. Accordingly, it is abundantly clear that appellees cannot rely on the fact that certain documents were copied to prove that they suffered any prejudice.

More importantly, the district court confused the role of individual TEA employees' actions and the validity of the TEA regulations that underlay the instant charges. Whether the TEA regulations were too vague to provide notice of their requirements, as appellees claimed, has to be determined in the first instance from the plain language of the regulations themselves. See *Russello* v. *United States*, 104 S.Ct. 296, 299 (1983); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981); see also *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983); *Rubin* v. *United States*, 449 U.S. 424, 429-431 & n.8 (1981). If the terms of those regulations are vague, then it will be the government's burden to come forward with evidence of agency interpretation to buttress the validity of the regulations. In determining agency interpretations of similar regulations, however, TECA has held that individual agency employees' interpretations or actions, as opposed to institutional interpreta-

tions, are entitled to little weight. *Pennzoil Company* v. *Department of Energy*, 680 F.2d 156, 161 & n.8, 171 (Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983); *Mobil Oil Corp.* v. *Tully*, 653 F.2d 497, 501-502 (Emer. Ct. App. 1981), vacated on other grounds, 455 U.S. 245 (1982); *McCulloch Gas Processing Corp.* v. *Department of Energy*, 650 F.2d 1216, 1229 (Emer. Ct. App. 1981). See also *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945). Hence, the individual caseworkers' actions in approving or disapproving appellees' or other requests for set-aside gasoline is not material to a determination of the relevant terms of TEA's regulations.[9]

Under those circumstances, it is difficult to understand how the loss of TEA records concerning the processing of appellees' applications harmed appellees. The district court apparently accepted appellees' argument that notations made by individual TEA caseworkers were material to their defense of how TEA defined and applied the term "hardship" from its regulations concerning the set-aside program (see 2/8/85 op. 6-7; appellees' memorandum at 33-41). But that contention fails to recognize that, as we pointed out above, entries made by a TEA caseworker on appellees' or other companies' applications simply did not bear the imprimatur of an official agency interpretation. Thus, the unavailability of TEA's records containing caseworkers' actions will not have any bearing on appellees' defenses to the charges against them. Accordingly, the preindictment delay and resulting loss of TEA's records did not prejudice appellees. And if any official interpretations of the regulations

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9. We also note that, contrary to appellees' claims of destruction of material documents, it appears that most, if not all, of the official Tennessee interpretations of the TEA regulations exist. Appellees received several such interpretations in response to their subpoena to the State (see appellees' memorandum at 15-20, 30, 34-36 and exhibit D).

have been lost so that the government will not be able to utilize those interpretations at trial, appellees will have benefitted rather than suffered from the delay.[10] Indeed, the delay itself certainly aided appellees in at least one respect: because the statute of limitations had expired, only three of the thirteen allegedly false filings listed in the conspiracy count could be brought as substantive counts (see government's response at 11).

Moreover, the court below also ignored the fact that appellees have subpoenead a vast amount of Department of Energy documents as well as records from the General Accounting Office.[11] Coupled with the copies of TEA's official interpretations of its regulations and other TEA documents that appellees already have received (see page 7 n.3, *supra*), it is quite speculative to conclude, as the district court ap-

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10. The same is true with respect to the copies of appellees' records from TEA files. The district court found those records to be incomplete and partially illegible (2/8/85 op. 8, 9). But the illegibility relates to caseworkers' handwritten entries on the records; we have already discussed the lack of materiality of such notations. As to completeness, on appellees' objection the district court prevented the Department of Energy investigator who copied the documents from testifying (1/30/85 Tr. 38-39). The investigator would have testified that he verified the accuracy of certain copies of appellees' records that were already in the Department's possession, and he would have said in addition that he copied all other records pertaining to appellees that were in their TEA file (*id.* at 39). But if a trial court were not to accept that testimony and consequently were to exclude certain of appellees' TEA records, that ruling likewise would redound to appellees' benefit. Accordingly, in this respect also the preindictment delay has been anything but harmful to appellees.

11. On November 6, 1984, appellees served subpoenas on the Department of Energy and the General Accounting Office, requesting records of investigations of set-aside programs, not just in Tennessee but nationwide and irrespective of whether those investigations resulted in prosecutions. The government moved to quash those subpoenas, but the district court denied that motion to quash and then denied a motion for reconsideration of that order. As a result, the Department of Energy is conducting a laborious, box by box search in order to prepare a response to appellees' subpoena.

parently did (2/8/85 op. 6-7), that appellees will not be able to mount a defense to the charges against them. But a defendant must show more than speculative prejudice in order to prevail on a claim of preindictment delay. *United States* v. *Moran*, 759 F.2d at 782; *United States* v. *Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983); *United States* v. *Birney* 686 F.2d 102, 105-106 (2d Cir. 1982). Since it is clear that when the missing TEA records are viewed correctly, they are at most collateral to the issues at trial, appellees simply have not met their burden of showing prejudice.

Appellees' other claim of prejudice concerning the missing records was that the TEA documents would have provided them with names of potential witnesses to support their contention that case workers were given total discretion whether to approve an application (see 2/8/85 op. 7; appellees' memorandum at 21, 45). What we have already said, however, concerning the weight to be given individual employees' actions likewise disposes of this part of appellees' contention about their need for the TEA documents. Appellees' claims thus are like those cases in which a defendant has merely asserted that he has lost the testimony of witnesses due to delay prior to indictment. The courts of appeals, however, have uniformly rejected such claims, particularly where—as here—there was no showing of the substance or relevancy of the witness' testimony. E.g., *United States* v. *Jenkins*, 701 F.2d at 855; *United States* v. *Daniels*, 698 F.2d 221, 224 (4th Cir. 1983); *United States* v. *Mills*, 641 F.2d 785, 788-789 (9th Cir.), cert. denied, 454 U.S. 902 (1981). In essence, then, it is clear that appellees merely are seeking to flood the trial with irrelevant documents and witnesses so as to confuse the jury, an attempt that should not be countenanced. See *Hamling* v. *United States*, 418 U.S. 87, 127 (1974). Accordingly, just as they failed to satisfy the first prong of the test for preindictment delay claims, appellees also have failed to demonstrate ac-

tual prejudice from the delay. As a result, the decision below must be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be reversed.

JOE B. BROWN
United States Attorney
Middle District of Tennessee

LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Opening Brief for the United States have been mailed to counsel for appellees at the following addresses:

F. Edwin Hallman, Jr., Esquire
Wm. Scott Schulten, Esquire
DECKER, COOPER & HALLMAN
1300 The Rhodes-Haverty Bldg.
134 Peachtree Street, N.W.
Atlanta, GA 30303

M. Clark Spoden, Esquire
DEARBORN & EWING
Suite 1200
One Commerce Place
Nashville, TN 32739

Dated: *July 16, 1985* *Louis M. Fischer*

LOUIS M. FISCHER
Attorney, Appellate Section
Criminal Division
Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044-0899

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due dili-

gence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do

not relate to discovery or inspection or recorded proceedings of a grand jury.

(4) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memo-

randa, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(3) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to Comply With a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may

enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

As amended Feb. 28, 1966, eff. July 1, 1966: April 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(20)-(28), 89 Stat. 374, 375.

§3500. Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to

deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

PART 211—MANDATORY PETROLEUM ALLOCATION REGULATIONS

211.66 Reporting requirements.
211.67 Allocation of domestic crude oil.
211.69 Entitlements adjustment mechanism.

APPENDIX A STANDBY REGULATIONS

EDITORIAL NOTE: Regulations in this part are affected by a document published at 44 FR 37938, June 29, 1979. See the redesignation table appearing in the Finding Aids section of this volume.

§ 211.66 Reporting requirements.

(a)-(h) [Reserved]

(i) Monthly transaction report. On or prior to the tenth day of each month, commencing with the month of February 1975, each refiner and eligible firm that was required to purchase or sell entitlements for the third month prior to the month in which the report is filed shall file with the DOE a report certifying its purchases or sales of entitlements for that prior month.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15

U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

[39 FR 42247, Dec. 4, 1974, as amended at 40 FR 10445, Mar. 6, 1975; 46 FR 20512, and 20520, Apr. 3, 1981]

NOTE: The provisions of this section may be affected by Standby Regulation 211-1. Standby Regulation 211-1 appears in Appendix A to Part 211. For the convenience of the user, a table listing all Standby Regulations and sections affected appears in the Finding Aids section of this volume.

§ 211.67 Allocation of domestic crude oil.

(a) *Issuance of entitlements.* (1) For each month, commencing with the month of June 1978, each refiner shall be issued a number of entitlements by the ERA equal to the number of barrels of crude oil included in the total volume of that refiner's crude oil runs to stills for that month multiplied by the national domestic crude oil supply ratio for that month, subject to the entitlement adjustment for small refiners set forth in paragraph (e) of this section and the entitlement adjustments in paragraph (a)(4) of this section.

(2) Refiners to which entitlements shall be issued under this section shall include all refiners classified as refiner buyers or refiner-sellers as of December 1, 1974 for purposes of § 211.65. Any refiner that is not so classified, or the refinery capacity of which is not certified by the DOE for purposes of § 211.65, shall apply to the DOE for certification of its refinery capacity for purposes of qualifying to receive entitlements under this section. With respect to the

granting of any such application for certification, the DOE shall consider the factors set forth in § 211.65(b)(1)(v) and (vi).

(3) For each month in the period July 1, 1979 through September 30, 1981, each eligible firm that has imported an eligible product in that month shall be issued a number of entitlements equivalent to fifty percent (50%) of the number of entitlements that would be received by a refiner (without giving effect to the provisions of § 211.67(e)) in that month with respect to inclusion of a number of barrels of crude oil in that refiner's crude oil runs to stills equal to a number of barrels of that eligible product imported by that eligible firm. An eligible product is imported for purposes of this paragraph (a)(3) in the month, as specified on Customs Forms 7501 and 7505, as appropriate, in which importation takes place.

(4) For each month, commencing with the month of June 1978, the number of entitlements issued under paragraph (a)(1) of this section to each refiner shall be increased by: (i) The number of barrels of California lower tier crude oil included in its adjusted crude oil receipts in that month multiplied by a fraction, the numerator of which is $2.38 plus or minus $.09 for each degree API gravity (or fraction thereof) by which the weighted average gravity of all California lower tier crude oil included in that refiner's adjusted crude oil receipts in that month either falls below or exceeds, respectively, 18 degrees API, and the denominator of which is the entitlement price for that month; and (ii) the number of barrels of California upper tier crude oil included in its adjusted crude oil receipts in that month multiplied by a fraction, the numerator of which is $1.45 plus or minus $.09 for each degree API gravity (or fraction thereof) by which the weight average gravity of all California upper tier crude oil included in that refiner's adjusted crude oil receipts in that month either falls below or ex-

ceeds, respectively, 18 degrees API, and the denominator of which is the entitlement price for that month: *Provided*, That the dollar value of additional entitlements issued under this paragraph (a)(4) shall not exceed the dollar value of the obligation (as calculated under paragraph (b) of this section) for the crude oil with respect to which such additional entitlements are issued. The refiner shall calculate and report the weighted average gravity of California lower tier crude oil and California upper tier crude oil separately, and in calculating such weighted average gravities shall (A) determine the gravity of such crude oil for each receipt of such crude oil in that month on the basis of the gravity of such crude oil at the time it becomes a receipt, and (B) determine a single monthly weighted average gravity for such crude oil by weight averaging (on a volumetric basis) of all such individual receipts in that month.

(5)(i) For each month, entitlements shall be issued with respects to a petroleum substitute as follows:

(A) In the case of a shale oil used as a feedstock or fuel in a domestic refinery, the refiner shall be issued, upon certification prior to January 28, 1981, to ERA that the shale oil has been used as a feedstock or fuel in a domestic refinery, that number of entitlements that would be received by the refiner if each barrel of the shale oil were a barrel of crude oil.

(B) In the case of a shale oil used or sold for use domestically as fuel other than in a refinery, the producer of the shale oil shall be issued, upon certification prior to January 28, 1981, to ERA that the shale oil has been used or sold for use domestically as fuel other than in a refinery, that number of entitlements that would be received by a refiner if each barrel of the shale oil were a barrel of crude oil.

(C) In the case of ethyl alcohol derived from domestic biomass and mixed with gasoline, the producer of the ethyl alcohol shall be issued that number of entitlements that would be received by a refiner if a barrel of ethyl alcohol were equal to 0.6189 barrels of crude oil; *Provided, that* entitlements will be issuable to a producer of ethyl alcohol only upon written certification prior to January 28, 1981, by the producer to ERA that

(*1*) The producer has actually mixed the ethyl alcohol with gasoline and used the resulting mixture domestically as fuel or sold the mixture for domestic use as fuel; or

(*2*) In any case where the producer sells the ethyl alcohol prior to mixing with gasoline, the producer has received written certification from a subsequent purchaser that such person

(*i*) Has been the first person to actually mix the ethyl alcohol with gasoline;

(*ii*) Has used the resulting mixture domestically as fuel or sold the mixture for domestic use as fuel;

(*iii*) Has based certification as to such use or sale upon documentation; and

(*iv*) Will maintain such documentation in a manner so as to be available for inspection at any time by the ERA within five years.

(D) In the case of municipal solid waste, the person who first processes the municipal solid waste to produce a solid fuel shall be issued that number of entitlements that would be received by a refiner if each ton of municipal solid waste processed were equal to 1.40 barrels of crude oil; *Provided, that* entitlements will be issuable to the processor of the municipal solid waste only upon written certification prior to January 28, 1981, by the processor to ERA that the processor has (*1*) actually used the solid waste or solid de-

rivative thereof domestically to produce useful energy and that the energy thus produced has actually been used as fuel; or (2) sold the solid waste or solid derivative thereof or useful energy produced from either the solid waste or its derivative for domestic use as fuel.

(E) In the case of methane derived from municipal sewage or domestic landfills, the collector of the methane shall be issued, upon certification prior to January 28, 1981, to ERA that the methane has been used or sold for use domestically as fuel, that number of entitlements that would be received by a refiner if each unit of methane having a gross heating value of 5.7 million BTU's were a barrel of crude oil.

(F) In the case of solid waste or a solid or gaseous derivative thereof which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of this chapter before January 28, 1981, that person designated by ERA as eligible to participate in the entitlements program with respect to such petroleum substitute shall be issued that number of entitlements that would be received by a refiner if the unit of measurement established by ERA for that petroleum substitute were a barrel of crude oil.

(G) In the case of a liquid petroleum substitute which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of this chapter before January 28, 1981, and which has a gross heating value of 5.7 million or more BTU's per barrel, that person designated by ERA as eligible to participate in the entitlements program with respect to the petroleum substitute shall be issued that number of entitlements that would be received by a refiner if a barrel of the petroleum substitute were a barrel of crude oil.

(H) In the case of a liquid petroleum substitute which has been designated as a petroleum substitute by ERA in

an order issued pursuant to § 205.95 of this chapter before January 28, 1981, and which has a gross heating value of less than 5.7 million BTU's per barrel, that person designated by ERA as eligible to participate in the entitlements program with respect to the petroleum substitute shall be issued that number of entitlements that would be received by a refiner if a barrel of the petroleum substitute were equal to a fraction of a barrel of crude oil, the numerator of which would be the gross heating value in BTU's per barrel of the petroleum substitute, and the denominator of which would be 5.7 million BTU's. An order issued by ERA to designate a petroleum substitute shall also designate the firm to which entitlements will be issued and the manner in which the use of the petroleum substitute by that firm shall result in entitlement issuances.

(ii) Each firm shall in its initial report to ERA for purposes of receiving entitlements pursuant to the provisions of paragraph (a)(5)(i) of this section submit written certification that all local, state, or federal permits or licenses required with respect to the production, distribution or any other use of the petroleum substitute have been obtained and provide copies of such permits and licenses and, as required by ERA, any information submitted to a governmental body for the purpose of obtaining any applicable permit or license. Each such firm shall in its initial report and each month thereafter submit any information required by ERA to be submitted by such firm on forms adopted by ERA for purposes of determining the entitlements issuable to such firm. A firm shall provide written certification in any submission that the information set forth therein is accurate and based upon documentation, and, further, that such firm shall maintain such records in a manner so as to be available for inspection at any time by the ERA within five years. Records required to be kept under this subparagraph shall

be made available for inspection at any time upon the request of a representative of ERA.

(6)(i) For each month in the period May 1, 1979 through October 31, 1979, each firm that imports "distillate fuel oil, less No. 4" and "kerosene" as those terms are defined in the instructions to ERA Form ERA-60, that is the importer of record under a license issued pursuant to Part 213 of this chapter, and that owns the product at the time of importation thereof pursuant to that license shall be issued a number of entitlements equal to the number of barrels of distillate fuel oil, less No. 4, and kerosene imported in that month by that firm multiplied by a fraction, the numerator of which is $5, and the denominator of which is the entitlement price for that month.

(ii) For purposes of paragraph (a)(6), the time of importation shall be the earliest of the following dates as specified on the Customs Form 7501 or 7505: (A) The "release date"; (B) the "entry date"; (C) the "validation date"; (D) the "PAID stamp date"; (E) the "date of importation"; or (F) the "withdrawal date."

(7)(i) For each month commencing with the month of August 1980, the United States Government shall be issued entitlements for crude oil purchased for, delivered to, and accepted for delivery to the Strategic Petroleum Reserve in the following month. The number of entitlements issued shall be calculated in accordance with the provisions of paragraphs (a)(7)(iii) through (vi) of this section.

(ii) In any case where the United States Government acquires from a refiner or other firm crude oil for storage in the Strategic Petroleum Reserve pursuant to an exchange or matching purchase and sale transaction, no domestic crude oil shall be deemed to have been transferred by that refiner or other firm in that exchange or transaction and such volume of domestic crude oil deemed to have been re-

tained shall be included in a refiner's crude oil receipts in the month in which such domestic crude oil is delivered to and accepted for delivery to the Strategic Petroleum Reserve, and the United States Government shall be issued entitlements for the month prior to the month in which such domestic crude oil is delivered to and accepted for delivery to the Strategic Petroleum Reserve. The number of entitlements issued shall be calculated in accordance with the provisions of paragraphs (a)(7)(iii) through (vi) of this section on the basis of the volume of crude oil given up by the Government in any such exchange or transaction. Notwithstanding anything to the contrary in 10 CFR Part 212, in any matching purchase and sale transaction subject to this paragraph, the United States Government may pay and the seller may receive any price for the crude oil purchased by the United States Government for the Strategic Petroleum Reserve.

(iii) One entitlement shall be issued for each barrel or imported crude oil and each barrel of domestic crude oil the first sale of which is not subject to the ceiling price limitations of Subpart C of Part 212 of this chapter.

(iv) A fraction of an entitlement shall be issued for each barrel of upper tier crude oil other then ANS upper tier crude oil, the numerator of which is the difference between the reported weighted average cost per barrel to refiners of upper tier crude oil other than ANS upper tier crude and the reported weighted average cost per barrel to refiners of lower tier crude oil, and the denominator of which is the entitlement price.

(v) A fraction of an entitlement shall be issued for each barrel of ANS upper tier crude oil, the numerator of which is the difference between the reported weighted average cost per barrel to refiners of ANS upper tier crude oil and the reported weighted average cost per barrel to refiners of

lower tier crude oil, and the denominator of which is the entitlement price.

(vi) The calculations in paragraphs (a)(7)(iv) and (a)(7)(v) of this section shall be based on the entitlement price fixed for, and the weighted average costs reported for, the month prior to the month in which the crude oil is delivered to the Strategic Petroleum Reserve.

(b) *Required purchase of entitlements by refiners.* (1) For each month, commencing with the month of February 1976, each refiner that has been issued fewer entitlements for that month than the number of barrels of deemed old oil (as calculated under paragraph (b)(2) of this section) included in its adjusted crude oil receipts shall purchase a number of entitlements effective for that month equal to the difference between the number of barrels of deemed old oil (as so calculated) included in that refiner's adjusted crude oil receipts for that month and the number of entitlements issued to and retained by that refiner. Entitlement purchases required under this paragraph (b) of this section with respect to a particular month shall be effected by the close of the second month following that month.

(2) To calculate the number of barrels of deemed old oil included in a refiner's adjusted crude oil receipts for purposes of the definition of national domestic crude oil supply ratio in § 211.62, paragraph (b)(1) of this section, and paragraph (c) of this section shall be calculated as follows:

(i) Each barrel of old oil shall be equal to one barrel of deemed old oil;

(ii) Each barrel of upper tier crude oil (except ANS upper tier crude oil) shall constitute that fraction of a barrel of deemed old oil, the numerator of which is equal to the reported weighted average cost per barrel to refiners of im-

ported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), heavy crude oil (as determined pursuant to § 212.59), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter for that month, less such weighted average cost per barrel to refiners of upper tier crude oil (except ANS upper tier crude oil), and the denominator of which is the entitlement price for that month;

(iii) Each barrel of ANS upper tier crude oil shall constitute that fraction of a barrel of deemed old oil the numerator of which is equal to the reported weighted average cost per barrel to refiners of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), heavy crude oil (as determined pursuant to § 212.59), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter for that month, less such weighted average cost per barrel to refiners of ANS upper tier crude oil, and the denominator of which is the entitlement price for that month.

(c) *Required sale of excess entitlements.* For each month, commencing with the month of February 1976, each refiner that has been issued a greater number of entitlements for that month than the number of barrels of deemed old oil (as calculated under paragraph (b)(2) of this section) included in its adjusted crude oil receipts shall sell

such excess entitlements, and the United States Government and any eligible firm (other than a refiner) that has been issued entitlements shall sell such entitlements.

(d) *Adjustments to volume of crude oil runs to stills.* (1) A refiner's volume of crude oil runs to stills shall (i) include (A) the volume of crude oil processed by another refiner for that refiner pursuant to a processing agreement and (B) the volume of crude oil processed by that refiner for a person other than a refiner pursuant to a processing agreement, and (ii) exclude the volume of crude oil processed by that refiner for another refiner pursuant to a processing agreement.

(2) The volume of a refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall be reduced by that refiner's volume of export sales under § 212.53 of this chapter in that month of refined petroleum products (including aviation fuels as defined in § 211.142 of this part, but excluding refined lubricating oils) and residual fuel oil, including sales to a domestic purchaser which certifies the product is for export; *provided*, however, that the volume of a refiner's crude oil runs to stills for a month shall not be reduced by that refiner's volume of export sales of Bunker C and Navy Special fuel oils and No. 4 diesel, which are sold for use as a marine fuel on a voyage departing from a United States port.

(3) The volume of a refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall include the total number of barrels of plant condensate and the total number of barrels of synthetic crude oil made from tar sands which are imported from Canada and are utilized in that month as

inputs to distillation units by a refiner, measured in accordance with the Bureau of Mines Form 6-1300-M. Neither plant condensate nor synthetic crude oil made from tar sands which are imported from Canada shall be eligible for inclusion in the volume of a refiner's crude oil runs to stills under this paragraph (a)(3) of this section unless payment has been made in accordance with Presidential Proclamation No. 3279, as amended, of any import license fees applicable to crude oil as defined for purposes of this section, which is imported for refining.

(4) For the period July 1, 1979 through September 30, 1981, for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio (but not for purposes of paragraph (e) of this section), the volume of crude oil runs to stills of any domestic refiner attributable to production of residual fuel oil transported in foreign flag tankers for sale (whether directly for consumption or for resale) or use in the eligible market (as defined in § 211.62) shall be reduced by fifty percent (50%). Any export sales of residual fuel oil giving rise to a deduction under paragraph (d)(2) of this section shall not be considered as residual fuel oil production for purposes of this paragraph (d)(4) of this section.

(5)(i) The volume of a refiner's crude oil runs to stills beginning with the month of January, 1981 in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall include the number of barrels of naphthas which are imported into Puerto Rico (other than imports from the U.S. Virgin Islands and other than naphthas imported into Puerto Rico which are acquired pursuant to an exchange or similar matching purchase and sale transaction for naphthas produced by a refinery located in the United States) and are utilized in that month as a petrochemical feedstock at a petrochemical

plant owned or operated by that refiner in Puerto Rico, as reduced in paragraph (d)(5)(ii) of this section. The number of eligible barrels of naphthas for a particular month further shall be multiplied by a fraction the numerator of which is equal to the weighted average per barrel cost of all naphthas imported into Puerto Rico for that month as to which entitlement issuances are sought less the imputed per barrel cost of domestically produced naphthas for that month, and the denominator of which is the entitlement value for a barrel of crude oil included in the volume of a refiner's crude oil runs to stills for that month. For purposes of this paragraph (d)(5)(i) of this section, the imputed per barrel cost of domestically produced naphthas for a particular month, commencing with January, 1981 shall be equal to 117 percent of the weighted average per barrel cost of all the crude oil receipts for all domestic refiners for that month.

(ii) The volume of naphthas eligible for inclusion in the volume of a refiner's crude oil runs to stills in a particular month under paragraph (d)(5)(i) of this section shall be reduced by the volume of export sales (under § 212.53 of this chapter, including sales to a purchaser which certifies it or an entity affiliated with that purchaser will export the product so purchased), for that month of products produced at the petrochemical plant that has processed the imported naphthas.

(iii) Notwithstanding any other provisions of this section, a firm other than a refiner that owns a petrochemical plant in Puerto Rico shall be eligible to receive entitlements with respect to naphthas processed at such a plant on the same basis as is provided for refiners in paragraphs (d)(5)(i) and (ii) of this section, except that such a firm shall not be eligible for any additional entitlements under the provisions of paragraph (e) of this section. Any such firm shall file reports under § 211.66 on the same basis as a refiner.

(iv) Any firm that is eligible for entitlement issuances under this subparagraph shall obtain appropriate certifications from any other firm to which it sells products produced at a petrochemical plant located in Puerto Rico. Such certification shall set forth whether or to what extent the products so purchased will be sold (whether directly by that other firm or indirectly through any firm affiliated with that other firm) in transactions that constitute export sales under § 212.53 of this chapter. Any firm purchasing products produced at a petrochemical plant located in Puerto Rico shall, upon the request of the owner or operator of that facility, certify to that owner or operator as to whether or what extent the further sale of those products by that firm (or any affiliate thereof) will constitute export sales under § 212.53.

(6)—(7) [Reserved]

(8) Commencing with the month of July 1978, the volume of a refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall include the total number of barrels of the liquid produced from oil shale that is found in the United States and used as a refining feedstock, blending feedstock or fuel in a domestic refinery in that month by a refiner.

(9) Commencing with the month of January 1979, the volume of crude oil runs to stills of a refiner in a particular month as to any of its refineries located in the State of Alaska, for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio, shall not include the number of barrels of unfinished oils or partially-refined petroleum products injected or reinjected by that refinery into the Trans-Alaska Pipeline System in that month.

(e) *Small refiner bias.* (1) In addition to the number of entitlements issuable under paragraph (a) of this section, subject to the limitations set forth in paragraphs (e)(2), (3), and (4) of this section, effective for refiners' volumes of crude oil runs to stills for June 1979, each small refiner shall be issued the following number of additional entitlements for each day of a particular month:

(i) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 0 to 10,000 barrels in that month, each such refinery shall receive a number of entitlements equal to the number of barrels of such refinery's daily average volume of crude oil runs to stills for that month multiplied by a fraction, the numerator of which is $.96, and the denominator of which is the entitlement price for that month;

(ii) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 10,000 to 30,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $9,600 plus $.315 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 10,000 barrels for that month, and the denominator of which is the entitlement price for that month;

(iii) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 30,000 to 50,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $15,900 minus $.095 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 30,000 barrels for that month, and the denominator of which is the entitlement price for that month;

(iv) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 50,000 to 100,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $14,000 minus $.10 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 50,000 barrels for that month, and the denominator of which is the entitlement price for that month;

(v) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 100,000 to 175,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is $9,000 minus $.12 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 100,000 barrels for that month, and the denominator of which is the entitlement price for that month.

(2) Effective for refiners' volumes of crude oil runs to stills for June 1977, no entitlements shall be issuable under paragraph (e)(1) of this section with respect to any volume of a small refiner's crude oil runs to stills attributable to a processing agreement for the account of that small refiner with another refiner.

(3) Each small refiner shall separately identify in its reports filed pursuant to § 211.66(h) of this subpart any volumes of its crude oil runs to stills not eligible (under the provisions of paragraph (e)(2) of this section) for small refiner bias entitlements.

(4) For purposes of the calculations in paragraph (e)(1) of this section, the daily average volume of a particular small refiner's crude oil runs to stills shall be computed as follows: The daily average volume of a small refiner's crude oil runs to stills (with respect to all of its refineries) shall be

multiplied by a fraction, the numerator of which is the capacity of that particular small refinery as certified pursuant to paragraph (a)(2) of this section, and the denominator of which is the capacity of that small refiner (with respect to all of its refineries) as certified pursuant to paragraph (a)(2) of this section.

(f) *Transactions under § 211.65.* (1) Effective for sales for the allocation quarter commencing March 1, 1976 under § 211.65 of this subpart, no sale by a refiner-seller under § 211.65 shall be deemed for purposes of this section to include any volume of domestic crude oil. If a refiner-seller sells actual volumes of domestic crude oil under § 211.65, the related volumes of old oil and upper tier crude oil shall be included in that refiner-seller's crude oil receipts in the month in which the sale is made. For purposes of the adjustments set forth in paragraph (a)(4) of this section, a refiner-buyer's receipts of imported crude oil and Alaska North Slope crude oil shall include volumes of crude oil shall include volumes of crude oil sold under § 211.65 to that refiner-buyer.

(2) For sales for allocation quarters prior to the allocation quarter commending March 1, 1976, each sale by a refiner-seller under § 211.65 shall be deemed to include volumes of old oil (and upper tier crude oil, if any) proportionate to the volumes thereof included in the deliveries of crude oil to that refiner-seller that determine the price at which the sale is made under § 212.94 of Part 212. Any volumes of domestic crude oil so deemed to be included in any sale under § 211.65 shall be reflected in the crude oil receipts of the refiner-buyer concerned. As to each sale for any such prior allocation quarter, each refiner-seller shall certify to the refiner-buyer the volume of old oil (and upper tier crude oil, if any) included in the volume of crude oil sold within twenty-eight (28) days following the month in which the crude oil is delivered to or for the account of the

refiner-buyer in accordance with the provisions of § 212.131 of Part 212.

(3) In determining the weighted average landed cost of crude oil delivered to a refiner-seller in a month pursuant to § 212.94 of Part 212, the cost of any required purchases or revenues from any sales of entitlements by that refiner-seller shall not be taken into account.

(g) *Exchanges of crude oil.* (1) Subject to the provisions of paragraph (g)(3) of this section, in any exchange of crude oil in which only quality and location differentials are given effect in the calculation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of domestic crude oil shall be deemed to have been transferred. Any volumes of domestic crude oil exchanged away or sold pursuant to any such exchange or matching purchase and sale transaction shall be considered as having been retained by the refiner or other firm that has so exchanged away or sold such volumes, regardless of the volume of crude oil received or purchased by that refiner or other firm in such exchange or transaction.

(2) Subject to the provisions of paragraph (g)(3) of this section, volumes of domestic crude oil deemed to be retained by a refiner under the provisions of paragraph (g)(1) of this section shall be (i) included in that refiner's crude oil receipts at the time the crude oil acquired pursuant to the related exchange or purchase and sale transaction constitutes a crude oil receipt under § 211.62 of this subpart to that refiner, or (ii) certified as old oil, upper tier crude oil, ANS crude oil, stripper well crude oil (as defined in Part 212 of this chapter), heavy crude oil (as determined pursuant to § 212.59), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), newly discovered crude

oil (as determined pursuant to § 212.79) market level new crude oil (as determined pursuant to § 212.74), or any other domestic crude oil the first sale of which is exempt from Part 212 of this chapter, as the case may be, under the provisions of § 212.131 of Part 212 when the crude oil acquired pursuant to the related exchange or purchase and sale transactions is sold to another firm.

(3) Where a refiner exchanges away or sells volumes of domestic crude oil in an exchange or matching purchase and sale transaction of the type described in paragraph (g)(1) of this section and receives in exchange or purchases in the transaction foreign crude oil that is delivered and processed outside the United States, that refiner shall include any domestic crude oil so exchanged away or sold by it in its crude oil receipts as of the date that domestic crude oil is so exchanged away or sold.

(4) The provisions of paragraph (g)(1) of this section shall not apply to transactions involving domestic crude oil which is exchanged away by a firm other than a refiner for foreign crude oil that is not processed in a refinery located in the United States. Any firm other than a refiner that has exchanged away or sold domestic crude oil within the United States pursuant to an exchange transaction in which other crude oil is also transferred outside the United States shall comply with the certification requirements of § 212.131 of Part 212 as to any volumes of old oil or upper tier crude oil, as the case may be, so exchanged away or sold. Any domestic crude oil delivered to a refiner in the United States pursuant to a transaction of the type described in this paragraph (g)(4) shall be included in the crude oil receipts of the refiner that receives, directly or indirectly through further sales or exchanges, the volumes of domestic crude oil that are the subject of the transaction, as provided in § 211.62 of this subpart.

(5) For purposes of this paragraph (g), "refiner" means any firm that owns, operates or controls the operations of one or more refineries, and includes any entity that is a part of or affiliated with, or that controls or is controlled by (whether directly or indirectly), a refiner.

(h) *Averaging of crude oil receipts.* Upon application by a refiner in accordance with the procedures established under Subpart G of Part 205 of this chapter within thirty (30) days following the close of a month, the DOE may adjust the crude oil receipts of that refiner for that month to permit the portion of such crude oil receipts specified by the DOE to be included in the crude oil receipts of that refiner for one or more subsequent months, if the volume of crude oil receipts in that month is significantly disproportionate to the volume of that refiner's crude oil runs to stills for that month due to a shutdown (by reason of either a mechanical failure or normal maintenance procedures) resulting in a fifty (50) percent or greater portion of that refiner's refinery capacity not having been operable for the duration of that month.

(i) *Issuance and transfer of entitlements.* (1) The DOE shall issue entitlements for each month (effective for the month of February 1976 and subsequent months) pursuant to a notice issued on the fifteenth day of the second month following that month.

(2) Each notice published by the DOE evidencing the issuance of entitlements under this section shall specify as to a particular month the national domestic crude oil supply ratio, the name of each refiner and other eligible firm to which entitlements have been issued, the number of barrels of deemed old oil included in each refiner's adjusted crude oil receipts, the number of entitlements issued to each such refiner or other firm, the number of entitlements required to be purchased or sold by each such refiner or other firm,

and the price at which entitlements shall be purchased and sold.

(3) No transfer of an entitlement shall be effective if made to any firm that is not purchasing such entitlement to fulfill such firm's obligations under this section.

(4) The price at which entitlements shall be sold and purchased shall be fixed by the ERA for each month and shall be the exact differential between the weighted average cost per barrel to refiners of old oil and such weighted average cost of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), heavy crude oil (as determined pursuant to § 212.59), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter, such costs to be equivalent to the delivered costs to the refinery.

(j) *Reporting errors.* (1) Refiners and eligible firms shall correct any errors contained in reports filed pursuant to § 211.66 by filing an amended report for the particular month. Based on any reporting errors so corrected, the DOE in its discretion may adjust entitlement issuances to the refiner or eligible firm in one or more months subsequent to the month in which the amended report is filed with the DOE, by issuing fewer entitlements than the number of otherwise issuable, by requiring the refiner or eligible firm to purchase entitlements in order to correct for excess entitlements issued in a prior month or by issuing entitlements over and above the number otherwise issuable to compensate for too few entitlements having been issued in such prior month. All entitlement issuances or purchase re-

quirements under this subparagraph shall give effect to any differential between the entitlement price for the month in which any correction is reflected as compared with the entitlement price for the month as to which the reporting error was made (except with respect to corrections to volumes of crude oil runs to stills where a corresponding adjustment to crude oil receipts was made as contemplated by the term "adjusted crude oil receipts" in § 211.62) and such other factors as the DOE deems appropriate.

(2) Notwithstanding the provisions of paragraph (j)(1) of this section, corrections of reporting errors for the months November 1974 through August 1975 shall be made as follows. DOE shall recalculate for those months the purchase and sale obligations (giving effect to any applicable relief under decisions and orders issued by DOE's Office of Exceptions and Appeals and to the provisions of Special Rule No. 3 for Subpart C) of all refiners and eligible firms based on inclusion in each month of each refiner's and eligible firm's corrected volume (as reported to the DOE) of crude oil runs to stills, volume of old oil included in its crude oil receipts (other than adjustments effected as contemplated by the term "adjusted crude oil receipts" in § 211.62) and eligible product imports. No entitlement price adjustment as contemplated by paragraph (j)(1) of this section shall be made in the calculations under this paragraph (j)(2). DOE shall then aggregate for each refiner and eligible firm its net purchase or sale amount (in dollars) for these months (giving effect to the published purchase and sale obligations for these months) and apply these amounts in substantially equal portions (translated into current entitlement values) to that refiner's or eligible firm's entitlement purchase or sale obligations for the months of July 1976 through February 1977.

(3) For purposes of this paragraph, errors required to be corrected by the filing of amended reports include (i)

clerical errors, and (ii) inaccurate estimates as to the domestic crude oil pricing composition of a particular volume of crude oil where the refiner had no basis, in prior experience or otherwise, on which to make that estimate.

(k) *Failure to consummate transactions.* The DOE may direct refiners or eligible firms that have not purchased the required number of entitlements under this section for a particular month to purchase such required number of entitlements at a price specified by the DOE from any refiner or eligible firm that has entitlements for such month available for sale. The DOE may direct refiners or eligible firms that have entitlements available for sale to sell such entitlements at a price specified by the DOE to refiners or eligible firms that have not purchased their required number of entitlements under this section.

(l) *Certification by non-refiners.* Within twenty-eight (28) days following each month, commencing with the month of January 1978, each firm other than a refiner that has delivered crude oil to a refiner for processing for the account of such firm pursuant to a processing agreement in that month shall certify to that refiner the respective volumes of and that firm's costs for old oil (separately identifying any California lower tier crude oil), upper tier crude oil (separately identifying any California upper tier crude oil), ANS crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), other domestic crude oils the first sale of which is exempt from Part 212 of this chapter, and imported crude oil contained in the crude oil so delivered to that refiner.

(m) *Adjustments to crude oil and product costs*—(1) *Refiners*—(i) *Entitlements purchased.* (A) The cost of entitlements purchased in a particular month pursuant to this

section by refiners, which shall be calculated exclusive of any reduction in such costs in a particular month because of entitlements issued for the importation of eligible products and exclusive of the cost of entitlements purchased in a particular month pursuant to adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section, shall be added to the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased cost to be applied to product prices in the following month under the "A_t" factor of the general formulae of § 212.83(c)(2) of this chapter): provided, that, to the extent that the obligation of a refiner to purchase entitlements is reduced by volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement, and that the monetary value of that reduced purchase obligation is used to reduce the processing fee otherwise payable by that firm under the processing agreement, or is otherwise passed on to that firm, such monetary value may also be added by that refiner to its cost of crude oil purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the monetary value of the reduced purchase obligation is passed on pursuant to this paragraph.

(B) The reduction in the cost of entitlements purchased in a particular month because of entitlements issued for the importation of eligible products shall be subtracted from the total cost of the product concerned, purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to prices of that product under the "B_t" factor of the appropriate formula for that product of § 212.83(c) of this chapter).

(C) The cost of entitlements purchased in a particular month pursuant to the adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section shall be a cost of crude oil purchased or landed in that month which shall not be applied to product prices pursuant to the "A" factor of the general formulae of § 212.83(c)(2) of this chapter, but which shall instead be applied only to prices for residual fuel oil sold in or into the East Coast market.

(ii) *Entitlements sold.* (A) The sales revenues from entitlements sold in a particular month pursuant to this section by refiners, which shall be calculated exclusive of any reduction in such sales revenues in a particular month pursuant to adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section, and exclusive of any sales revenues from the sale of entitlements issued for the importation of eligible products, shall be subtracted from the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to all product prices in the following month under the "A" factor of the general formulae of § 212.83(c)(2) of this chapter); provided, that, to the extent that the sales revenues from entitlements which are issued for volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement are used to reduce the processing fee otherwise payable by that firm under the processing agreement, or are otherwise passed on to that firm, such sales revenues shall not be subtracted by that refiner from its cost of crude oil purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the entitlement sales revenues are passed on pursuant to this paragraph.

(B) The sales revenues from entitlements issued for the importation of eligible products which are sold in a particu-

lar month shall be subtracted from the total cost of the product concerned, purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to prices of that product under the "$B_i t$" factor of the appropriate formula for that product of § 212.83(c)(2) of this chapter).

(C) The reduction in sales revenues from entitlements sold in a particular month pursuant to the adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section shall be a cost of crude oil purchased or landed in that month which shall not be applied to product prices pursuant to the "A" factor of the general formulae of § 212.83(c)(2) of this chapter, but shall instead be applied only to prices for residual fuel oil sold in or into the East Coast market.

(2) *Resellers and retailers.* The sales revenues from entitlements sold pursuant to this section by resellers or retailers shall be subtracted from the cost of the product in inventory for which the entitlements were issued, so as to reduce the weighted average unit cost of that product in inventory computed pursuant to § 212.92 of this chapter.

(3) *Sales of eligible products to eligible firms.* The total amount of any reductions in the cost of eligible products to the seller because of entitlements issued for the importation of such products, which are required by paragraphs (m)(1) and (m)(2) of this section, shall be applied exclusively to the determination of maximum lawful prices charged in sales in which the purchaser does not receive entitlements for the importation of an eligible product. Separate price calculations shall be made for sales of eligible products in which the purchaser receives entitlements for the importation of eligible products, which shall comply in all respects with the regulations of Subparts E or F of Part

212 of this chapter, except that the amount of increased product cost used to compute such prices shall not be reduced because of entitlemens issued for the importation of eligible products.

(4) *Timing.* The date of purchase or sale of entitlements for purposes of determining the date on which a cost or a cost reduction is incurred under § 212.83(c) or § 212.93 of this chapter shall be the date on which the transaction is reported to have taken place on the monthly transaction report filed with the DOE under paragraph (i) of § 211.66.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

[41 FR 13903, Apr. 1, 1976]

EDITORIAL NOTE: For FR citations affecting § 211.67, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 211.69 Entitlements adjustment mechanism.

(a) *Scope.* This section applies to all refiners and other firms listed on any Entitlements Notice issued with respect to crude oil runs-to-stills and crude oil receipts during the period October 1, 1980, through January 27, 1981, as well as to any other firms which owe money to, or are entitled to receive money from, the entitlements program.

(b) *Purpose.* This section provides a method for an orderly termination of the domestic crude oil entitlements program originally established in § 211.67.

(c) *Definitions.* For purposes of this section, all terms that are contained in or necessary to the implementation of this section shall have the same meanings as under the provisions of 10 CFR Part 211 that were in effect on January 27, 1981, except as specifically set forth in the following definitions:

"Adjustment" means the receipt of an invoice of recertified crude oil previously booked into a refiner's account in a month during the reporting period which results in a change to the volume and/or category as previously reported on the ERA-49 and a subsequent invoice to a reported volume based on either a prior invoice or a good faith estimate. A good faith estimate is a volume based on that refiner's past experience as to its composition for pricing purposes of domestic crude oil of the same origin.

"Amendment" means a resubmission of a previously filed report for a month in the reporting period resulting from an internal company error.

"Claim" means the dollar amount determined by ERA to be owed to a firm resulting from adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to § 211.67 for the period from October 1, 1980, through January 27, 1981, or resulting from an administrative or judicial determination.

"Crude oil runs-to-stills" includes crude oil runs-to-stills applicable to the Entitlements Notice issued for each month in the reporting period, increased for any month for which a firm received entitlements pursuant to § 211.67(a)(3) or § 211.67(a)(5) by a number equal to the number of entitlements issued pursuant to these sections in

that month, divided by the national domestic crude oil supply ratio for that month.

"ERA" means the Economic Regulatory Administration of the Department of Energy (DOE).

"Obligation" means the dollar amount determined by ERA to be owed by a firm as a result of adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to § 211.67 for the period from October 1, 1980, through January 27, 1981, or resulting from an administrative or judicial determination.

"Reporting period" means the period October 1, 1980, through January 27, 1981.

(d) *Determination of claims and obligations*—(1) *Amendments.* Firms shall correct all errors contained in reports filed pursuant to § 211.66 or § 211.67(a)(5)(ii) for the reporting period by filing amended reports which must be received by ERA by August 15, 1981. For each month for which an amended report is filed by a firm pursuant to this subsection, ERA shall determine for that firm: (i) The obligation for that month by determining the dollar value of the amendment, using the entitlement data for that month; or (ii) the claim for that month by determining the dollar value of the amendment, using the entitlement data for that month.

(2) *Invoice adjustments.* (i) All refiners shall report to DOE on Form ERA-49 for each reported category of crude oil the sum of all adjustments to the volume of crude oil receipts during the reporting period not previously reported to ERA. If a refiner has no adjustments for the reporting period, it shall file a report of zero adjustments. Reports must be received by ERA by August 15, 1981.

(ii) Refiners shall designate on the Form ERA-49 the month during the reporting period when the crude oil subject to the adjustment first was received.

(iii) For each month for which an adjustment is filed by a refiner pursuant to this subsection, ERA shall determine for that refiner: the obligation for that month by determining the dollar value of the increased number of barrels of deemed old oil, using the deemed old oil ratios and the entitlement price for that month; or, the claim for that month by determining the dollar value of the decreased number of barrels of deemed old oil, using the deemed old oil ratios and the entitlement price for that month.

(3) *Other claims and obligations.* (i) ERA shall determine the dollar value of any other claims or obligations of any firm in any month which is not otherwise included in paragraphs (d)(1) or (2) of this issue by using the entitlement price and other entitlement data for that month.

(ii) To the extent that any claim or obligation determined pursuant to paragraph (d)(3)(i) of this section is not applicable to a particular month in the reporting period, ERA shall prorate the amount of such claim or obligation equally among all months in the reporting period.

(d) *Total calculation.* (1) ERA shall determine the net calculation for each month in the reporting period by subtracting the sum of all obligations for that month from the sum of all claims for that month.

(2) The proportional share of the net calculation for each firm for each month in the reporting period shall be determined by multiplying the net calculation by a fraction. The numerator of the fraction is equal to the crude oil runs-to-stills for that firm used to compute the Entitlements Notice for that month, and the denominator is equal

to the sum of the crude oil runs-to-stills of all firms used to compute the Entitlements Notice for that month.

(3) For each firm, ERA shall determine the sum of its proportional shares of the net calculations for each month as computed pursuant to paragraph (e)(2) of this section, which shall be the total calculation for that firm.

(f) *Net obligations and net claims.* ERA shall determine each firm's net obligation or net claim as follows:

(1) If the sum of its claims for the reporting period, minus the sum of its obligations for the reporting period, and minus its total calculation (determined pursuant to paragraph (e) of this section) is greater than zero, it is a net claim and the firm shall be entitled to that sum of money from firms with net obligations.

(2) If the sum of its claims for the reporting period, minus the sum of its obligations for the reporting period, and minus its total calculation (determined pursuant to paragraph (e) of this section) is less than zero, it is a net obligation and the firm shall be required to pay that sum of money to firms with net claims.

(g) *Settlement of net obligations and net claims.* (1) As soon as practicable after August 15, 1981, ERA shall publish in the FEDERAL REGISTER a list of the net claim or net obligation of each firm. Firms with net obligations shall complete payments of such obligations to firms with net claims within 10 days from the date of publication of the list in the FEDERAL REGISTER.

(2) ERA may direct firms which have not paid monies equal to their net obligations under this section to transfer money, not in excess of their net obligation, to such firms as determined by ERA.

(3) Within 20 days from the date of publication of the list of net claims and obligations, each firm with a net claim

or obligation shall certify to ERA in writing that it has completed the transactions required by this section, with whom the transaction has been completed and the dollar amounts for each firm. Certifications should be addressed to:

> Entitlements Program Office, Economic Regulatory Administration, 20th Street Postal Station, P.O. Box 19326, Washington, D.C. 20461

(4) If a firm with a net claim does not receive any or all of its money from firms with net obligations, that firm may apply to ERA for an order establishing the amount of the deficiency. Upon issuance of the order by ERA, the firm shall be deemed to have a claim against the entitlements program pursuant to paragraph (h)(1) of this section for the amount of the deficiency.

(h) *Post-clean-up claims and obligations.* (1)(i) If after issuance of the list of net obligations and net claims, the Office of Hearings and Appeals of the Department of Energy, the Federal Energy Regulatory Commission or a court of competent jurisdiction determines, in an order no longer subject to appeal, that any party is entitled to a claim against the entitlements program, firms listed on the list of net obligations and net claims issued pursuant to paragraph (g)(1) of this section shall owe the amount of the claim.

(ii) Each firm shall pay to the party receiving the order an amount equal to the claim determined pursuant to paragraph (h)(1)(i) of this section multiplied by a fraction, the numerator of which is equal to the total crude oil runs-to-stills for that firm used to compute Entitlements Notices in the reporting period, and the denominator of which is the sum of the crude oil runs-to-stills for all firms used to compute Entitlements Notices in the reporting period.

(2)(i) If after issuance of the list of net obligations and net claims, the Office of Hearings and Appeals of the Department of Energy, the Federal Energy Regulatory Commission or a court of competent jurisdiction determines, in an order no longer subject to appeal, that any party has an obligation to the entitlements program, other than as a result of entitlements enforcement actions, firms listed on the list of net obligations and net claims issued pursuant to paragraph (g)(1) of this section shall be owed that obligation.

(ii) The party shall pay to each such firm an amount equal to the obligation multiplied by a fraction, the numerator of which is equal to the total crude oil runs-to-stills for that firm used to compute Entitlements Notices in the reporting period, and the denominator of which is the sum of the crude oil runs-to-stills for all firms used to compute Entitlements Notices in the reporting period.

(3) For purposes of paragraphs (h)(1) and (h)(2) of this section, an order for which there is no explicit statutory or regulatory time limit on appeals shall be deemed to be "no longer subject to appeal" if the order is not appealed within 60 days from the date of issuance of the order.

(The information collection requirements contained in paragraph (g)(3) were approved by the Office of Management and Budget under control number 1903-0073)

[46 FR 36098, July 13, 1981, as amended at 46 FR 43654, Aug. 31, 1981; 46 FR 63209, Dec. 31, 1981]